

SERVED: February 12, 1993

NTSB Order No. EA-3805

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of February, 1993

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JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Dockets SE-12882, 12883,
)	12884,
12885,)	
	v.)	12909, 12911,
)	and 12912
AVIANCE INTERNATIONAL, INC.,)	
GEORGE ARTHUR MOORE,)	
OMER SECKINGER GROSS,)	
MARCUS TED MILLER,)	
JAMES ROBERT HAWKINS,)	
WILLIAM ELLIOTT DUNWODY, and)	
DAVID WARREN WILKINSON,)	
)	
Respondents.)	
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OPINION AND ORDER

The Administrator and all seven of the respondents have
appealed from the oral initial decision Administrative Law Judge
Jimmy N. Coffman rendered in this proceeding on January 14, 1993,

at the conclusion of a three-day evidentiary hearing.¹ By that decision, the law judge affirmed in part emergency orders of the Administrator which sought to revoke the Part 135 Air Carrier Certificate held by respondent Aviance and all of the airman certificates held by the carrier's six pilots.² The law judge, on allegations that the respondents had falsified certain flight training records in violation of section 61.59(a)(2) of the Federal Aviation Regulations (14 CFR Part 61),³ sustained revocation as to Aviance and respondents Moore and Wilkinson, but modified the orders issued to respondents Hawkins, Dunwody, Gross, and Miller to provide for six-month suspensions.⁴ The law

¹An excerpt from the hearing transcript containing the decision is attached.

²All of the airman respondents except respondent Miller held airline transport pilot certificates. Respondent Miller had a commercial pilot certificate and a mechanic certificate. Respondents Moore and Gross also held flight instructor certificates, and, in addition, respondent Moore held mechanic and flight engineer certificates.

³FAR section 61.59(a)(2) provides as follows:

"§61.59 **Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**

(a) No person may make or cause to be made--

* * * * *

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or [sic] any certificate or rating under this part...."

⁴A copy of the December 11, 1992 Emergency Order of Revocation against respondent Aviance is attached. It contains essentially all of the allegations that also appear in the orders

judge also found that while Aviance, as alleged, had violated the recordkeeping requirement in FAR section 135.63(b),⁵ it had not used a pilot (namely, respondent Miller) who did not meet initial and recurrent pilot testing requirements, which would have violated FAR sections 135.95(b) and 135.293(a)(2) and (3).⁶

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issued to the individual respondents.

⁵FAR section 135.63(b) obligates a Part 135 certificate holder to keep for at least twelve months the records required to be maintained under section 135.63(a)(4). That section provides as follows:

"§135.63 Recordkeeping requirements.

(a) Each certificate holder shall keep at its principal business office or at other places approved by the Administrator, and shall make available for inspection by the Administrator the following--

* * * * *

(4) An individual record of each pilot used in operations under this part, including the following information:

(i) The full name of the pilot.
(ii) The pilot certificate (by type and number) and ratings that the pilot holds.

(iii) The pilot's aeronautical experience in sufficient detail to determine the pilot's qualifications to pilot aircraft in operations under this part.

(iv) The pilot's current duties and the date of the pilot's assignment to those duties.

(v) The effective date and class of the medical certificate that the pilot holds.

(vi) The date and result of each of the initial and recurrent competency tests and proficiency and route checks required by this part and the type of aircraft flown during that test or check.

(vii) The pilot's flight time in sufficient detail to determine compliance with the flight time limitations of the part.

(viii) The pilot's check pilot authorization, if any.

(ix) Any action taken concerning the pilot's release from employment for physical or professional disqualification.

(x) The date of the completion of the initial phase and each recurrent phase of the training required by this part."

⁶Consistent with the dismissal of those charges against the

On appeal, the Administrator argues that the law judge erred in reducing the sanction for any of the pilots found to have falsified training records. The respondents, in their appeals, contend that the law judge erred in upholding any of the charges.

Our review of the briefs and the record persuades us, as discussed below, that the respondents' appeals should be granted, a conclusion that moots the appeals filed by the Administrator.⁷

The falsification charges in these consolidated cases are predicated on the Administrator's belief that certain 1991 Part 135 "Airman Competency/Proficiency Check" records, FAA Form 8410-3, submitted to FAA inspectors during a quality audit of the carrier conducted in early 1992, reflect flight checks for Aviance pilots Gross, Miller, Hawkins, Dunwody, and Wilkinson that had not in fact been accomplished. Consistent with that belief, the Administrator at the hearing sought to prove that such checks could not have taken place and, therefore, the representations in the flight evaluation records that they had taken place amounted to intentionally false or fraudulent statements. We agree with the respondents that the Administrator's evidence was insufficient to establish the section 61.59 violations alleged.

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carrier, the law judge dismissed the corresponding charges (under sections 135.293(a) and 135.343) against respondent Miller, who the law judge concluded had not served as a crewmember before accomplishing appropriate initial and recurrent training.

⁷Both the Administrator and the respondents have filed reply briefs opposing each other's appeals.

This proceeding is somewhat atypical in that in most cases involving falsification charges, there is no doubt that a false statement has been made in some record. Rather, the issue is usually whether the individual who made the statement did so intentionally, an element that almost invariably must be established circumstantially, since direct evidence of intent is rarely available. Here, by contrast, the issue is not whether there was an intentional falsification; the issue is whether there was a falsification at all. We think the Administrator's proof must be more compelling in the latter situation, for it is far more difficult to defend against a case that is based on conjectural liability. It is in the light of these considerations that we note that the Administrator did not produce any direct evidence that respondent Moore, the carrier's check airman, had created bogus flight check forms for his carrier's pilots. For the reasons to which we now turn, we are not persuaded that the circumstantial evidence the Administrator relied on in support of his belief that the checks had not been done was adequate to prove the falsification charge against that respondent.

The conclusion of the law judge that respondent Moore falsified the flight check forms is, for the most part, based on the negative inferences that he drew from (1) the inability of several air traffic controllers, familiar with Aviance's Lear jets operations at the Macon, Georgia, airport, to recall any training flights, involving multiple approaches, by Aviance

pilots during 1991; (2) the fact that the flight checks in most cases had not been logged by the Aviance pilots in their personal logbooks; and (3) his own belief that the pilots would not have been able to perform the flight checks in the amount of time listed on the forms.⁸ As to the first basis, we do not doubt that the controllers at an airport of light to moderate traffic activity would likely be cognizant of many, if not most, of the operations conducted there, at least during duty hours.

Notwithstanding that recognition, we have at least two concerns with the law judge's reliance on the controllers' testimony in this matter. One is the lack of any proof, aside from the generalized belief that one or another of the several controllers who testified would in all probability have been on duty on the relevant dates, that any of the controllers had in fact been in the tower or handling approach control when the flight checks assertedly were given or taken. Second, respondents, by identifying a training flight in 1991 of which the controllers who testified were unaware, demonstrated that their memories were not dispositive, either because they may not have been on duty or because they failed to recollect.⁹ It seems to us that since at

⁸There was also some evidence, either not disputed or conceded by respondents, that the dates shown on some of the flight check forms may have been incorrect by several days. We do not understand the Administrator to be arguing that such mistakes, if that is what they were, would be material for purposes of a section 61.59 charge.

⁹Respondent's Exhibit R-8 indicates that an FAA inspector gave respondent Moore a flight check involving multiple approaches at Macon on August 5, 1991. This operation appears to have escaped the controllers' attention. Since others, including

least some training flights by Aviance pilots were performed at the airport despite the controllers' contrary recollections, such recollections should not have been accorded such heavy weight by the law judge.

As to the evidence on the logging of the flight time for the proficiency checks, we do not share the law judge's apparent view that the fact that a pilot has not logged a training flight leads necessarily to the conclusion that no training was received. At the same time, we recognize that the absence of a logbook entry for a flight a pilot was entitled, but not required, to log would certainly be corroborative of direct evidence that no training flight had occurred, especially for a pilot who needed to accumulate hours for a higher certificate.¹⁰ Such a circumstance does not appear to have been a factor in this case, however, and, again, since the records for the flight checks had not otherwise been shown to be apocryphal, we think the law judge read too much into the evidence concerning the Aviance pilots' logbooks.

The law judge's apparent belief that thorough or complete flight checks could not have been performed in the times given on some of the forms is inconsistent with the evidence of both

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the half dozen or so at issue in this proceeding, may have also gone unnoticed, the controllers' recollections are not dispositive.

¹⁰As noted supra, all but one of the Aviance pilots already had airline transport pilot certificates. For the one pilot who did not (respondent Miller), the central issue was not so much whether he had been given a flight check, but in which month had it been given. That pilot testified that he had logged the check flight.

parties and, therefore, provides no basis for finding that the checks were not given. In this connection, an FAA inspector testified that 1.9 hrs. for a flight check would be "reasonable" and 1.6 hrs "adequate" (See transcript at 120, 122), and respondents introduced as exhibits flight check forms demonstrating that such testing had been conducted by an FAA inspector on respondent Moore in as little as 1.2 and 1.1 hrs.

In view of the foregoing, we must reverse the falsification findings as to respondents Moore and Aviance, for the Administrator clearly did not advance evidence sufficiently probative, reliable, or substantial to support the violations sustained by the law judge.¹¹ However, even if the evidence had been sufficient to sustain violations by respondents Moore and Aviance, it would not follow, as we next discuss, that falsifications by the company's other pilots had been shown.

All of the flight evaluations for pilots Gross, Miller, Hawkins, Dunwody, and Wilkinson were signed by respondent Moore, who owns respondent Aviance and serves as both a check airman and line pilot for the company.¹² Thus, assuming, arguendo, that the records contain entries that falsely reflect flight checks that

¹¹The falsification charge against respondent Aviance is predicated solely on the alleged falsifications of its employees.

¹²The testimony of respondent Moore indicates that respondent Wilkinson, Aviance's chief pilot, prepared some or all of the check forms from information Moore supplied him. There is no evidence to support the law judge's speculation that they were in "cahoots" to falsify records, although there is evidence that would support a finding that respondent Wilkinson may have made errors as to the dates he put on some of the forms.

were not given, in order to establish that these pilots violated FAR section 61.59, it would have to be shown that they caused such entries to be made. We find no evidence in the record which would support such a conclusion.¹³ It is not enough, in this connection, for the Administrator to have advanced certain circumstantial evidence, as previously discussed, that would be consistent with a finding that the flight checks did not occur as reflected on the forms.¹⁴ Rather, the burden was to show that the pilots who the forms indicate Moore had evaluated were in some way responsible for the manner in which the forms were

¹³We find no merit in the Administrator's suggestion that the respondents admitted in their answers to the revocation orders (which served as the complaints herein) that they had caused false entries to be made in their records. What they admitted was that entries relevant to their performance of flight checks, which they maintained had been properly performed, were made on forms that were given to the Administrator. In other words, the individual pilots did not deny that they were the predicates for the preparation of forms for various flight checks. We do not view such an acknowledgement as supplying the element of causation FAR section 61.59 contemplates. In this regard we note that it is far from clear in the record whether any of the pilots saw the 8410-3 forms before respondent Moore signed them, and at least two of them testified that they had not seen them after he had done so.

¹⁴Contrary to the law judge's apparent belief, it is also not enough, for purposes of establishing a section 61.59 violation, to show that the pilots, on learning that records respecting them had been falsified or were for any reason inaccurate, did nothing to correct the situation. While the law judge may well be right that an airman has a duty to ensure the accuracy of records bearing on his training and proficiency, a breach of whatever duty an airman may have in this regard would not be evidence of his falsification of records, created by others, found or known to be inaccurate. Moreover, we have previously rejected reliance on what an airman should have known, as opposed to a showing of actual knowledge, as a basis for finding intent to falsify a record. See, e.g., Administrator v. Juliao, NTSB Order No. EA-3087 (1990).

filled out.¹⁵ No such showing was made, or even attempted, here.

Last, we think the respondents have demonstrated that the law judge erred in affirming a violation of the recordkeeping requirement in FAR section 135.63(b). In this regard, it appears that the Administrator, whose inspector may not have been sufficiently precise in requesting the production of certain documents, faults respondent Aviance for not having supporting records, such as daily flight logs and load manifests, for dates corresponding to the records it did supply on flight training. See Complaint at 6, paragraph 9. We agree with the respondents that the retention schedule for such records, as to operations for which they must be prepared, is 30 days under section 135.63(d).¹⁶ We do not believe the evidence establishes that respondent Aviance did not have, or failed to produce, records it was required under section 135.63(b) to keep for 12 months.

Based on the foregoing, we do not find that safety in air commerce or air transportation and the public interest require the affirmation of the Administrator's orders of revocation.

¹⁵At a minimum, we think the evidence necessary to meet this burden would include some showing that the pilot had, directly or otherwise, agreed to or endorsed the creation of a phony flight check form.

¹⁶Respondents argue that section 135.63(d) only applies to passenger flights, not training flights.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeals are denied;
2. The respondents' appeals are granted; and
3. The initial decision of the law judge and the emergency orders of revocation are reversed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.